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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-259

RILEY RITCHIE GARDNER, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

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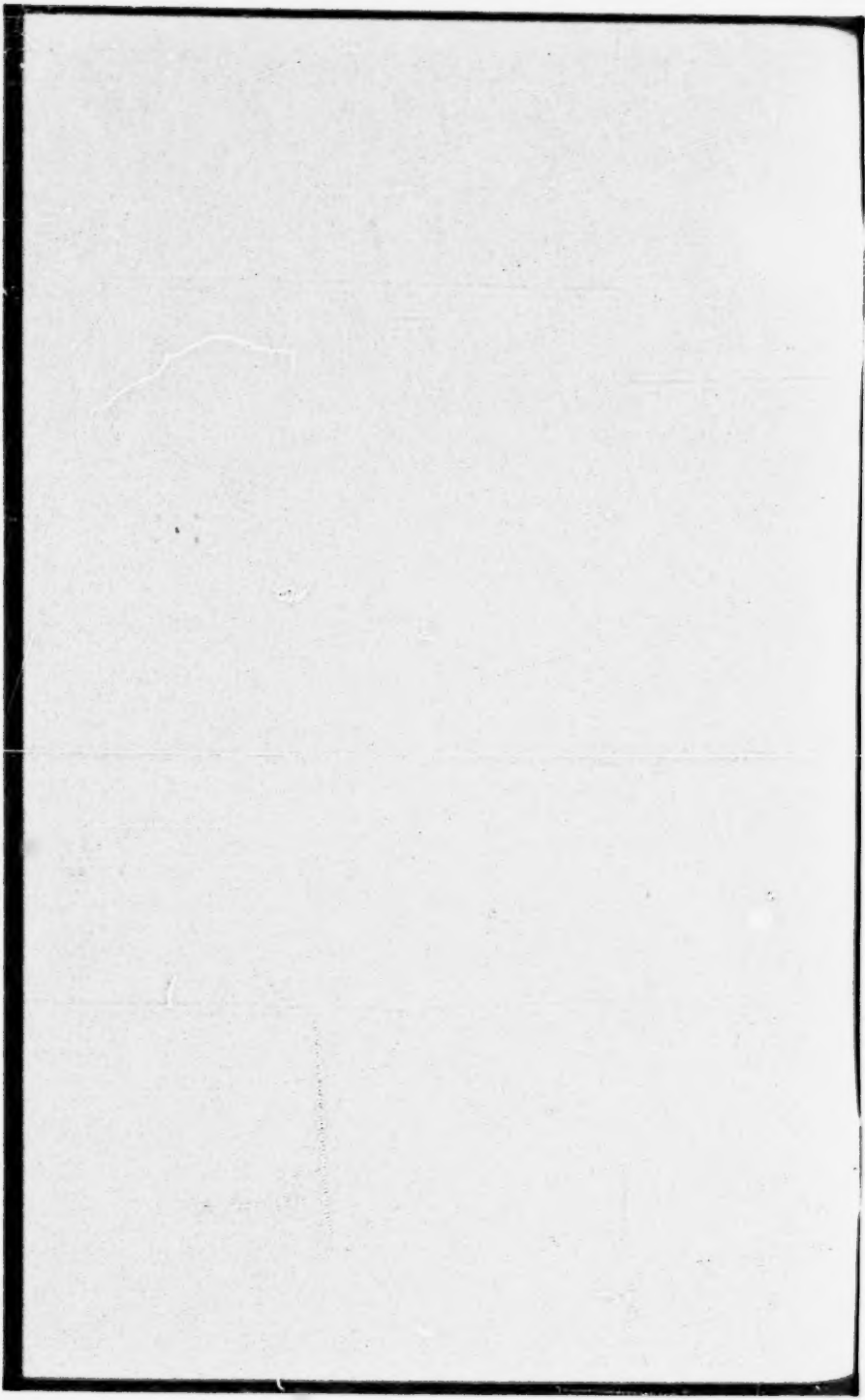

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. _____

RILEY RITCHIE GARDNER, Petitioner

v.

STATE OF OREGON, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

The petitioner, Riley Ritchie Gardner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on February 19, 1974.

OPINION BELOW

The opinion of the Court of Appeals of the State of Oregon is reported at 98 Adv. Sh. 1218, ___ Or. App. ___, 518 P2d 1341 (1974) No opinions were rendered by the Circuit Court

of the State of Oregon, which was the trial court, or by the Supreme Court of the State of Oregon in denying discretionary review.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on February 19, 1974. The Supreme Court of Oregon denied a Petition for Review, on June 18, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED:

1. Was it a violation of petitioner's rights under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution for the Oregon Court of Appeals to refuse to review a challenge to the constitutionality of Oregon's "reckless" murder statute, ORS 163.115 (1) (b) on the basis of a procedural rule which was created by the Oregon

Court of Appeals after trial of petitioner's case?

2. Is ORS 163.115 (1) (b), which provides that, "criminal homicide consititutes murder when . . . it is committed recklessly under circumstances manifesting extreme indifference to the value of human life," unconstitutional because:

a. it is so vague and standardless that it violates the requirements of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution; and

b. it prescribes a different, and more severe, punishment for the same acts prohibited by ORS 163.125 (1) (a), which provides that, "criminal homicide constitutes manslaughter when . . it is committed recklessly . . . ," in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Consitution?

3. When the indictment in petitioner's

case charged "reckless" murder, ORS 163.115 (1) (b), a crime which does not have as one of it's elements "intent" or "premeditation", and when all of the evidence in petitioner's case indicated that petitioner did not know the identity of the person he killed, did the admission of evidence concerning a death threat allegedly made by petitioner to the deceased one month before the killing violate petitioner's right to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED:

U.S. Constitution, AMENDMENT V

> "When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty

or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, AMENDMENT XIV

"Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ORS 135.630, (1) & (4)

"135.630 Grounds of demurrer. The defendant may demur to the accusatory instrument when it appears upon the face thereof:

(1) If the accusatory instrument is an indictment, that the grand jury by which it is found had no legal authority to inquire into the crime charged because the same is not triable within the county; . . . . . (4) That the facts stated do not constitute an offense; . . . "

ORS 136.500

"136.500 Motion in arrest; basis and

time for making. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or a verdict of guilty. It may be founded on either or both of the grounds specified in subsections (1) and (4) of ORS 135.630, and not otherwise. The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made and heard as the court directs."

ORS 136.535

"136.535 Timing of proceedings on motion in arrest of judgment and motion for new trial. (1) A motion in arrest of a judgment or a motion for a new trial, with the affidavits, if any, in support thereof shall be filed within five days after the filing of the judgment sought to be set aside, or such further time as the court may allow.

(2) Any counteraffidavits shall be filed by the state within five days after the filing of the motion, or such further time as the court may allow.

(3) The motion shall be heard and determined by the court within 20 days from the time of the entry of the judgment and if not heard and determined within that time, the motion shall conclusively be considered denied.

(4) Except as otherwise provided in this section, ORS 17.605 to 17.630 shall apply to and regulate new trials in criminal actions, except that a new trial shall not be granted on application of the state."

ORS 161.085 (9)

"161.085 Definitions with respect to culpability. . . .

(9) 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. . . ."

ORS 163.005

"163.005 Criminal homicide. (1) A person commits criminal homicide if, without justification or excuse, he intentionally knowingly, recklessly or with criminal negligence causes the death of another human being.

(2) 'Criminal homicide' is murder, manslaughter or criminally negligent homicide.

(3) 'Human being' means a person who has been born and was alive at the time of the criminal act."

ORS 163.115 (1)

"163.115 Murder; life imprisonment required. (1) Except as provided in ORS 163.125, criminal homicide constitutes murder when:

(a) It is committed intentionally; or

(b) It is committed recklessly under

circumstances manifesting extreme indifference to the value of human life; or

(c) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit arson in the first degree, burglary in the first degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree or sodomy in the first degree and in the course of and in furtherance of the crime he is committing or attempting to commit, or the immediate flight therefrom, he, or another participant if there be any, causes the death of a person other than one of the participants. . . ."

ORS 163.125 (1)

"163.125 Manslaughter. (1) Criminal homicide constitutes manslaughter when:

(a) It is committed recklessly; or

(b) A homicide which would otherwise be murder is committed under the influence of extreme emotional disturbance, which disturbance is not the result of his own intentional, knowing, reckless or criminally negligent act, and for which disturbance there is a reasonable explanation; or

(c) A person intentionally causes or aids another person to commit suicide. . . ."

STATEMENT OF CASE

After a month long trial, petitioner was convicted by a jury of murder and three counts

of assault in the second degree. He was sentenced to life imprisonment for the murder conviction.

Petitioner's trial grew out of an incident that occurred at the Spot Tavern in Tualatin, Oregon on the evening of January 19, 1973. Petitioner, Steven Lynn Zabriskie, who had a broken left hand, Edwin Pete Lindley, who was on crutches and who had a full leg cast, and Hila Mae Medford, Lindley's girlfriend, went to the tavern to play pool. During a game between a team composed of petitioner and Zabriskie and a team composed of Larry Hardy and David Haldeman, a fight broke out between the teams.

As soon as the fight started, several customers joined in, siding against petitioner and his friends. The fight raged across the front of the tavern and during the fight petitioner was struck in the head with a pool cue by Joe Daulton and cut on the left hand causing

a laceration approximately two inches long and half an inch deep, which partially severed one of the tendons that extends the thumb. Evidence produced at trial indicates that the cut might have been caused by a knife.

After receiving these injuries, petitioner was thrown out of the bar, head first into a car, by Keith Huntley. This dazed petitioner and his left hand began spurting blood.

Petitioner's friends were inside the tavern. He re-entered armed with a knife. Huntley began fighting with petitioner and Zabriskie. Huntley was armed with a large formica top bar table with a metal base.

From the beginning of the fight until this point in the fight, Derial (Cash) McCaw, the deceased, had been in the middle to upper right section of the tavern, well out of the action, which had started by the pool tables in the lower left section of the tavern and spread across

the front of the tavern. McCaw now left his position of safety and proceeded toward the front of the tavern. A blood test indicated that McCaw had a .20% blood alcohol by weight in the blood.

McCaw threw people out of his way. He pushed the bar maid over the bar, knocking the wind out of her and re-injuring her rib. Fred Matthews, a friend of McCaw's, tried to restrain him. He grabbed McCaw's arm and was probably thrown into Huntley.

Petitioner was fighting with Huntley when Huntley lost his balance. The table was jerked from Huntley's hand and McCaw came through with his hand raised. When petitioner saw the hand go up, he raised his knife. Petitioner did not know the identity of the person he killed and the stabbing occurred so swiftly that despite the large number of witnesses in the area, no one testified that he had seen the stabbing. There was a single knife wound in McCaw.

Petitioner was not charged with intentional murder, ORS 163.115 (1) (a). Instead, he was charged with "reckless" murder, ORS 163.115 (1) (b), which makes it a crime punishable by life imprisonment to kill someone "recklessly""under circumstances manifesting extreme indifference to the value of human life."

In the course of trial, evidence was introduced that one month prior to the stabbing, petitioner had had a dispute with Lester Tompkins, McCaw's brother-in-law, at the Spot Tavern. There had not been a fight but petitioner had said to a witness:

> ". . .'I will show [Lester Tompkins] a hassle. I will kill that son of a bitch' and he turned around and pointed at Cash McCaw who was standing in the doorway and he said 'and that stubby fucker there, too'. . ."

Petitioner objected to the introduction of this evidence on grounds of relevance.

Other evidence at trial established that

petitioner rarely visited the tavern.

Following the jury verdict, petitioner filed a motion in arrest of judgment and a motion for a new trial. Both motions had as their grounds that the indictment failed to state facts that constituted a crime because it was in the language of ORS 163.115 (1) (b) which petitioner considered to be unconstitutional and, therefore, void. The trial judge considered these motions and denied them.

On appeal, the Oregon Court of Appeals held that:

> "An objection to the constitutionality of a statute upon which an indictment is based must be raised by pre-trial demurrer and, if not, is waived."

The courts refusal to consider the merits of petitioner's attack on the constitutionality of ORS 163.115 (1) (b) was a surprise to petitioner.

REASONS FOR GRANTING THE WRIT

1. Life imprisonment is the most serious

punishment that can be imposed by an Oregon Court. Petitioner feels that appellate review of Oregon's "reckless" murder statute, ORS 163.115 (1) (b), is essential, because that statute is so vague and standardless that judges and jurors have no standards by which to judge the conduct of those accused under it. Additionally, conviction for violation of ORS 163.115 (1) (b) results in a life sentence, but ORS 163.115 (1) (b) punishes the identical type of conduct punished by ORS 163.125 (1) (a), the manslaughter statute, which carries only a ten year maximum. This is a denial of equal protection.

2. Petitioner would have preferred to have the courts of his state review his constitutional challenge. He raised his constitutional question in the trial court in the form of a challenge to the indictment made in a motion in arrest of judgment and a motion for a new trial. These motions argued that the facts stated in the indictment did not consitute a crime "be-

cause the phrase in Count I of the indictment to wit: 'manifesting extreme indifference to the value of human life' is unconstitutionally vague . . ." (ab,)

Oregon appellate courts have always held that "the objection that the facts stated do not constitute a crime may be raised for the first time in the appellate court and is not waived by failing to demur." State v. Hunt, 3 Or. App. 634, 637, 475 P2d 596 (1970). However, the Court of Appeals ruled that "an objection to the constitutionality of a statute upon which an indictment is based must be raised by pre-trial demurrer and, if not, it is waived..." (ab,)

This ruling suprised petitioner. It resulted in the creation of a new procedural rule which was not in effect at the time of petitioner's trial. By refusing to hear petitioner's constitutional argument on the basis of an ex-post facto law, the Oregon Court of Appeals vio-

lated petitioner's rights to due process of law. This Court is petitioner's last hope, because his state court refused to abide by its own laws. Such abuse of process, with it's concommitent result of petitioner's continued life imprisonment, should be remedied by this Court.

3. At petitioner's trial, evidence of a month old death threat was introduced. Petitioner did not know the identity of the man he killed at the time of the stabbing and the "reckless" murder statute has no "intent" element. Petitioner feels that these are instances when the introduction of irrelevant evidence can be so highly prejudicial that the intoduction of this evidence will rise to a denial of the constitutional guarantee of Due Process. This is such an instance.

ARGUMENT

I

Count I of petitioner's indictment read, in relevant part, as follows:

> "Riley Ritchie Gardner . . .
> " . . . did unlawfully, feloniously and recklessly cause the death of another human being, to wit: Derial W. McCaw by stabbing with a flat-bladed knife the lung area of the person of said Derial McCaw, said conduct of the said [defendant] manifesting extreme indifference to the value of human life." (Ab,)

After the jury returned it's verdict, petitioner filed a motion in arrest of judgment and a motion for a new trial with the trial court. ORS 136.500 states that a motion in arrest of judgment may be founded on the grounds set out in ORS 135.630 (4), to wit; that a defendant may demur to the accusatory instrument when it appears upon the face thereon that the facts stated do not constitute an offense.

Petitioner's argument before the trial court was to the effect that the facts stated in the indictment did not state a crime because the phrase "conduct . . . manifesting extreme indifference to the value of human life" was so vague that it rendered the statute, ORS 163.115 (1) (b) unconstitutional. Petition-

er reasoned that an indictment which uses the words of a statute which is invalid because of a constitutional infirmity would state facts which would not constitute a crime, because conduct constitutes a crime only if made illegal by a valid legislative act.

The trial court denied petitioner's motions. On appeal the Oregon Court of Appeals refused to discuss the merits of petitioner's constitutional challenge. The court said:

> "An objection to the constitutionality of a statute upon which an indictment is based must be raised by pre-trial demurrer and, if not, it is waived. State v. Zusman, 1 Or. App. 268, 271, 460 P2d 872 (1969) rev. den., cert. den. 398 U.S. 905, 90 S. Ct. 1698, 26 L. Ed. 2d 63 (1970); State v. Krause, 251 Or. 318, 323, 445 P2d 500 (1968) . . ." (Ab,)

The Zusman and Krause cases cited by the Court of Appeals hold that a challenge to the constitutionality of a statute " not presented to the trial court" will not be considered for the first time on appeal. Zusman, supra 460 P2d at 874; Krause, supra, 251 Or.at 323. Peti-

tioner did present his constitutional challenge to the trial court in the motion in arrest of judgment and the court ruled adversely to him.

In addition, there are numerous Oregon cases that state that "the objection that the facts stated do not constitute a crime may be raised for the first time in the appellate court and is not waived by failing to demur." State v. Hunt, 3 Or. App. 634, 637, 475 P2d 596 (1970); see also, State v. Schulman, 6 Or. App. 81, 485 P2d 1252 (1971).

Petitioner's attack on ORS 163.115 (1) (b) should have been discussed on it's merits in the Oregon Court of Appeals. By ruling that attacks on the constitutionality of a statute may be raised only by pre-trial demurrer, the Oregon Court of Appeals was creating an ex post facto law, with regards to petitioner. This violated petitioner's right to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

II

ORS 163.115 (1) (b) is unconstitutional for the following reasons:

1. EQUAL PROTECTION

"Criminal homicide" is committed if without justification or excuse, a person knowingly, intentionally or recklessly or with criminal negligence cases the death of another human being, ORS 163.005 (1). "Criminal homicide" is murder, manslaughter or criminally negligent homicide depending upon the circumstances under which it is committed, ORS 163.005 (2). Criminal homicide is murder when it is committed recklessly under the circumstances manifesting extreme indifference to the value of human life, ORS 163.115 (1) (b). Criminal homicide is manslaughter when it is committed recklessly, ORS 163.125 (1) (a). A person convicted of murder receives a mandatory sentence of life imprisonment, ORS 163.115 (4). Manslaughter is a class B felony and carries a maximum penalty of ten years imprisonment. ORS 161.605 (2); ORS 163.125 (3).

> "The Fourteenth Amendment operates to forbid discrimination by the state against persons or calsses in criminal cases. Ughbanks v. Armstrong, 208 U.S. 481, 52 L. Ed. 582. And it has been held that a statute which prescribes different punishment or different degrees of punishment for the same acts committed under the same circumstances by persons in like situations is in violation of the Equal Protection Clause. (citing cases) . . ." State v. Pirkey, 203 Or. 697, 704, 281 P2d 698 (1955)

Petitioner feels that the phrase, "Under circumstances manifesting extreme indifference to the value of human life" adds nothing to the phrase, "reckless" as that word is used in the manslaughter and "reckless" murder statutes. Before a jury can find a person guilty of either crime, it must first find that the person acted recklessly, as that word is defined in ORS 161.085 (9). This means that the jury must find that the person engaged in conduct while aware that there was a high risk that the conduct could lead to the death of a person; that the risk was unjustifiable and constituted a gross deviation from the manner in which a reasonable

person would act; and that the conduct caused a death.

If a jury found all that, what other factor in the situation different from those it used to decide that the element of "recklessness" existed, could a jury find, to reach a conclusion that the circumstances which existed, showed that the peron's conduct "manifested extreme indifference to the value of human life." The phrase is redundant. If it is redundant then there is no difference in the elements required to prove manslaughter or "reckless" murder and ORS 163.115 (1) (b) is violative of the Constitution's Equal Protection Clause, because it prescribes a different degree of punishment for the same acts punished by ORS 163.125 (1) (a) committed under the same circumstances by persons in like situations.

2. DUE PROCESS OF LAW

A law fails to meet the requirements of

the Due Process Clause of the Fourteenth Amendment to the United States Constitution, "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leave judges and jurors free to decide, without any legally fixed standard, what is prohibited and waht is not in each particular case." Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966)

The legislature has failed to provide a definition for the phrase "under circumstances manifesting an extreme indifference to the value of human life." It is petitioner's position that the absence of a definition makes the phrase so vague that ORS 163.115 (1) (b) violates the Due Process Clause because the legislature has provided no standards that judge or jury can use to determine what conduct manifests an extreme indifference to the value of human life.

In State v. Hodges, 254 Or 21, 457 P2d 491 (1969), the Oregon Supreme Court ruled

that a staute which punished "any person who does any act which manifestly tends to cause any child to become (a child subject to the jurisdiction of the juvenile court because his) behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others" was unconstitutional because of the vagueness of the language just quoted.

> "Without a legislative declaration of standards, the trial court would have no basis for submitting one case to a jury and refusing to submit another case to the jury. Further, the trial jury would have no basis for deciding that a given course of conduct tended to endanger the welfare of a chile or that it had no such tendacy . . . [T]he freewheeling power to legislate so as to find a defendant guilty should not be institutionalized in a criminal statute . . ." Id., 254 Or. at 27-28.

The similarity between the language condemned in Hodges and the language under attack in the case at bar is striking. Even more striking and terrifying are the consequences of the present statutory scheme. Without a

definition for the phrase, it is going to be the gut reaction of each juror that determines whether a person whose reckless act results in the death of another will go to jail for a maximum of ten years or life.

III

> " . . . The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." Spencer v. Texas, 385 U.S. 554, 563-564 (1966)

Normally, the admission of irrelevant evidence would not rise to the level of a constitutional violation. In the case at bar, the admission of evidence concerning a month old death threat was of such a highly prejudicial nature that it was impossible for petitioner to receive a fair trial once the evidence was admitted. Petitioner claimed self defense. He was a member of a motorcycle club and, therefore, the jurors would be preconditioned to reject such a claim. The fight itself had received much publicity. What more

damaging evidence could be produced ~~that~~ than evidence that petitioner had threatened the death of the person he later stabbed? Yet, such evidence was clearly irrelevant in petitioner's case.

Appellant was charged with a violation of ORS 163.115 (1) (b) which states that "criminal homicide constitutes murder when . . . it is committed recklessly under circumstances manifesting extreme indifferences to the value of human life."

> " 'Recklessly' when used with respect to a result or circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from which the standard of care that a reasonable person would observe in the same situation."

An examination of this statute makes it clear that an individual is punished under ORS 163.115 (1) (b) for engaging in conduct which

creates a high risk that death will result. His reasons for engaging in the conduct are not relevant. Therefore, evidence of a month old death threat to the deceased, which would bear on elements such as "intent" or "premeditation", is ~~relevant~~ irrelevant when the crime charged is "reckless" murder, because "intent" and "premeditation" are not elements of the crime of "reckless" murder.

There are several cases which have ruled that "on trial for manslaughter, malice not being an element of the offense, evidence of previous threats or declarations made by the accused against the deceased is not admissable." Hicks v. State, 55 Ga. App. 149, 189 S.E. 373 (1937); in accord; Com. v. Matthews, 89 Ky. 287, 12 S.W. 333, 11 Ky. Law Rep. 505 (1889); State v. McGarrity, 139 La. 430, 71 S.D. 730 (1916).

"Reckless" murder is no more than an aggravated form of manslaughter.

The "death threat" evidence is also irrelevant because there was not one iota of evidence from which the jury could have concluded that petitioner knew the identity of the man he killed. Under similar circumstances, an Alabama court held that it was reversable error to permit the introduction of evidence of a death threat made coincidentally by a defendant to a person he accidently shot. Naler v. State, 25 Ala. App. 486, 148 So. 880 (1933)

Petitioner's trial presented a close question. The admission of irrelevant evidence of such a highly prejudicial nature made it impossible for petitioner to receive a fair trial and violated petitioner's rights under the Due Process Clause of the Fifth and Fourteenth Amendments.

CONCLUSION

Petitioner is going to have to spend the rest of his life behind bars unless this Court

reverses his conviction. Petitioner was tried under a statute which violates several constitutional prohibitions. The Oregon Court of Appeals invented a new procedural rule after petitioner was tried in order to escape from dealing with the merits of petitioner's constitutional attack. Finally, evidence of the month old death threat was so highly prejudicial that after it's admission it was impossible for petitioner to receive a fair trial.

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon and the order of the Supreme Court of Oregon.

Respectfully Submitted,

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No. 2053—February 19, 1974

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent*, *v.* RILEY RITCHIE GARDNER (Nos. 14-920, 14-921), *Appellant*.

Appeal from Circuit Court, Washington County.

HOLGER M. PIHL, JR., Judge.

Argued and submitted January 25, 1974.

Phillip M. Margolin, Portland, argued the cause for appellant. With him on the briefs was Alfred M. Varnes, Portland.

W. Michael Gillette, Solicitor General, Salem, argued the cause for respondent. With him on the brief was Lee Johnson, Attorney General, Salem.

Before SCHWAB, Chief Judge, and FORT and TANZER, Judges.

AFFIRMED.

TANZER, J.

Defendant was indicted for murder, ORS 163.115-(1)(b), and assault in the first degree, ORS 163.185, along with several other participants in a tavern fight which resulted in a death and several injuries. After an extensive trial, defendant was convicted of murder and three counts of assault in the second degree, ORS 163.175, and he appeals on the basis of several assignments of error.

First, defendant assigns as error the denial by the trial court of his motion for new trial and motion in arrest of judgment which raised for the first time

constitutional challenges to the murder statute, ORS 163.115 (1)(b), and the first degree assault statute, ORS 163.185, as void for vagueness. An objection to the constitutionality of a statute upon which an indictment is based must be raised by pre-trial demurrer and, if not, it is waived. *State v. Zusman*, 1 Or App 268, 271, 460 P2d 872 (1969), *rev den, cert den* 398 US 905, 90 S Ct 1698, 26 L Ed 2d 65 (1970); *State v. Krause*, 251 Or 318, 323, 445 P2d 500 (1968). Defendant's claim that such an assertion is reviewable if first raised on a motion for new trial and motion in arrest of judgment, ORS 136.810, is incorrect. *State v. Thomson*, 203 Or 1, 16, 278 P2d 142 (1954). Consequently, we do not reach the issue.

The trial court allowed over defendant's objection testimony by the manager of the tavern where the fight occurred, that about one month before the fatal fight defendant had had a dispute at the tavern with one Lester Tompkins, a brother-in-law of Derial "Cash" McCaw, the decedent:

> "A Well, in questioning him [the defendant] to find out what was wrong, he said that Lester Tompkins had bumped into him in the can and made some statement. I said, 'Well, surely that isn't worth having a big hassle over' and he said, 'Well, that s.o.b. is still alive.' And something to that nature and I said, 'Well, I don't—
>
> "• • • • •
>
> "A • • • He [defendant] said, 'That son of a bitch is still alive and he pushed me in the can.'
>
> "I said, 'Well, I don't think it is worth a man's life for him pushing you.'
>
> "• • • • •

"A Okay, Lester Tompkins started to get in his car and there was three or four people trying to keep everything down to earth, and Ritchie Gardner was kind of half turned to me and I said, 'Come on, man, let's just let it go, because the guy is leaving and he has his wife and kids in the car.' I said, 'You don't want to hassle him in front of his wife and kids.'

"And he said, 'I will show him a hassle. I will kill that son of a bitch.' And he turned around and pointed at Cash McCaw who was standing in the doorway and he said, 'And that stubby fucker there, too.' "①

Defendant assigns admission of the evidence of death threats as error because

"• • • evidence of a month old death threat to the deceased, which would bear on elements such as 'intent' or 'premeditation', is irrelevant when the crime charged is 'reckless' murder, because 'intent' and 'premeditation' are not elements of the crime of 'reckless' murder."

The murder count on the indictment is brought in the statutory language of ORS 163.115 (1)(b) which provides that "criminal homicide constitutes murder when • • • [i]t is committed recklessly under circumstances manifesting extreme indifference to the value of human life," rather than ORS 163.115 (1)(a) which applies when criminal homicide "is committed intentionally." "Recklessly," as used in the indictment, is defined by ORS 161.085 (9) as follows:

" 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining

① The trial court refused a prosecution offer of proof that the defendant had on other occasions made statements which evidenced an approving attitude toward violence, which statements were unconnected in time or person to the offense charged.

> an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

Proof that the defendant articulated an intention to kill the decedent and his brother-in-law in response to slight provocation must therefore be measured for relevancy against the allegation of the indictment that defendant's conduct manifested "extreme indifference to the value of human life." The threats demonstrate defendant's attitude toward human life, particularly McCaw's, in that they tend to show that he had either determined to kill McCaw or, at the least, would "consciously disregard a substantial and unjustifiable risk" that his stabbing would cause McCaw's death. Thus it was relevant on the question of defendant's state of mind and was properly admitted.

The defendant's next assignments of error challenge the admission of rebuttal evidence to impeach his testimony and that of his friend, co-defendant and witness, Steven Zabriskie. Zabriskie testified on direct examination as to the day's activities with the defendant from the time he woke up until after the fight in the evening, but he omitted any mention of an encounter with the police which occurred on their way home from an afternoon tour of some taverns. The prosecutor asked him about the encounter on cross-examination. Zabriskie testified that the police harassed members of his motorcycle club without provocation, that on that afternoon the police had pulled them over, but that there had been no "particular hassle,"

and that he, Zabriskie, had not yelled "profanities and obscenities" at the officer before he pulled them over.

The defendant also testified on direct examination about the day's activities, including the police encounter. He denied that there had been any rough language or contentiousness. On cross-examination, however, he admitted the use of coarse name calling and said that the officer challenged him, defendant, to a fight.

The prosecutor called the police officer in rebuttal. He testified over objection, among other things, that Zabriskie had directed coarse names and gestures toward him and that the defendant repeatedly challenged him to a fight, bragged about his boxing experience, and expressed his desire to see the officer's blood and disfigurement.

The trial judge, by proper instruction, limited the jury's consideration of the officer's testimony to rebuttal purposes.

Defendant assigns the admission of the rebuttal testimony as error, urging that it is improper as impeachment on a collateral matter. *State v. Edwards*, 106 Or 58, 210 P 1079 (1922). The state responds that the evidence was properly admitted to show that Zabriskie's and defendant's testimony of the day's activities was incomplete due to defect of memory or lack of candor.

ORS 45.600 provides that a "witness may be impeached by the party against whom he was called, by contradictory evidence • • •." As a general rule, however, such impeachment may not relate to collateral matters. Stated otherwise, a cross-examiner must ac-

cept the answers he receives to questions "not relevant to the issue and not touched on indirect examination." *Smith v. White,* 231 Or 425, 433, 372 P2d 483 (1962). In many cases, this one included, it is hard to draw the line of relevancy. One of the principal purposes of the rule being the expedition of trial, its application is largely left within the trial court's discretion. *Flande v. Brazel,* 236 Or 156, 160, 386 P2d 920 (1963). In this case, the impeachment testimony was properly admitted because it was opened up in the defendant's direct testimony, *State v. Segura,* 98 Adv Sh 1030, — Or App —, — P2d — (1974), and because the trial court, in the proper exercise of its discretion, did not allow the trial of one event to become the trial of another event.

Defendant complains of the manner in which the prosecutor sought to impeach him by proof of a former conviction pursuant to ORS 45.600. The defendant admitted on direct examination to having been convicted of "Misdemeanor of malicious mischief." He argues that under *State v. Rollo,* 221 Or 428, 351 P2d 422 (1960), the prosecutor was barred from introducing any further evidence. Here, the prosecutor was allowed to establish on cross-examination that the name of the crime was "criminal mischief in the second degree" and that the crime and the conviction occurred in 1972. When the prosecutor began to ask regarding the facts of the case, his question was promptly interrupted by an objection and the court properly limited the inquiry.[6]

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[6] "Q [Mr. Keutzer:] Mr. Gardner, you indicated that you were convicted of malicious mischief?

"A I believe it was.

(Continued on page 1224)

Defendant relies upon the following language in *State v. Rollo*, 221 Or at 437:

"• • • It is proper to ask a witness if he has ever been convicted of a crime. This may be done with or without a record of conviction being avail-

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(Continued from page 1223)

"Q Would that be the same as criminal mischief in the second degree?

"A I don't know. I don't know the laws of the State of Oregon, sir.

"Q Was that in July 11 of 1972 that that happened?

"A That I was convicted of it?

"Q No, that the criminal act that you were convicted of occurred, if it did.

"A I didn't know it was a criminal act but I believe it was around that date.

"Q You didn't know it was a criminal act when you did it?

"MR. VARNES: Your Honor, I object to any further inquery [sic] into this conviction. It has been brought up that he has a conviction and that closes the matter.

"THE COURT: Overruled.

"Q Go ahead. You didn't know it was a crimnal [sic] act?

"A I didn't know it was a—that it was written out on your paper there—I don't know—

"Q Well, didn't you plead guilty to intentionally damaging a car by—

"MR. VARNES: Your Honor, I am going to object to the facts of this case being brought in. The man has been decieved [sic]. There was no definition of the crime and—

"THE COURT: For this purpose the prosecutor is allowed to bring out, one, the crime, when and where.

"MR. KEUTZER: It is the State's position that since it was brought out on direct that it was brought out not for impeachment—obviously he is not impeaching his own witness—but for asserting the truth of it, which opens it up for cross examination.

"MR. VARNES: I did it merely for background, Your Honor.

"THE COURT: You could have objected to that and didn't so you are permitted in cross examination to bring out the crime, when, and where.

"Q Do you recall when this occurred, the conviction?

"A No, not the conviction. I pled guilty to the charge.

"Q And was that in 1972?

"A Yes, I believe it was."

> able. If the witness answers 'No,' that is the end of the interrogation. If an authenticated record to refute the negative answer is available it may be introduced to show an actual previous conviction of crime by the witness. Or, the record may be introduced in the first instance, without a preliminary question to the witness, to show previous convictions. That, however, is the limit permissible by our procedure. • • •"

He also cites *State v. Gilbert,* 138 Or 291, 294, 4 P2d 923 (1931), which holds that the district attorney may

> "• • • ask the defendant if he has ever been convicted of a crime. If the defendant answers in the affirmative, that is the end of the matter so far as the state is concerned. The defendant may, if he wishes, explain what the crime was, or, if this is not done, the prosecuting attorney may introduce the record of the judgment showing that the defendant has been convicted. • • •"[6]

The literal language of these cases would seem unreasonably restrictive. Absent surprise, a party may not impeach his own witness by asking on direct examination about prior convictions. *State v. Hamilton,* 4 Or App 214, 476 P2d 207, *rev den* (1971); *State v. Miller,* 1 Or App 460, 460 P2d 874, *rev den* (1970). Where the proponent breaches that rule, mischief often follows. Direct testimony of prior convictions would seem to authorize cross-examination to the same extent as any other direct testimony would. Further, if *Rollo* is read literally, if the evidence is oral, then only the fact of conviction may be proved,

[6] Defendant also relies upon Mannix v. Portland Telegram, 144 Or 172, 23 P2d 138, 90 ALR 55 (1933), but the rationale and holding in that case are internally inconsistent and it is best limited to its facts. *Cf.* State v. Akles, 9 Or App 501, 497 P2d 1207 (1972).

but if the evidence is documentary, then the number, place and names of the crimes of the convictions may be shown. There is no sound reason, however, to believe that the Supreme Court intended by *Rollo* to hold that a party who may prove facts by documents may not prove them also or instead by questions and answers. The facts are equally relevant whatever form or forms of competent evidence are employed to prove them, although the admission of cumulative evidence would be within the discretion of the trial judge as is any other. *See State v. Akles,* 9 Or App 501, 504, 497 P2d 1207 (1972). A literal reading of *Rollo* also indicates that the witness who admits to having once been convicted of a crime precludes any further inquiry, but one party should not be able to bar the other from impeaching adverse witnesses. *Rollo* dealt with an overzealous prosecutor. The result was language which exceeded the facts by far but which has never been modified or withdrawn. It has occasionally been skirted where good sense demanded, *cf. State v. Ponton,* 240 Or 30, 32-33, 399 P2d 30, *cert den* 382 US 1014 (1966), and should be applied in light of the facts upon which the holding is based.

In this case, regardless of whether the allowance of the questions as to the name of the crime and the year of the crime and conviction was error under *Rollo,* we cannot see that the defendant was prejudiced by exposing the jury to that information.

We have fully considered the defendant's other assignments of error. We are satisfied that they are incorrect, but that discussion of them will not benefit the bench or bar in subsequent cases.

Affirmed.

Indictment 14-920, handed down by the Grand Jury on January 23, 1973 rads in important part as follows:

"Count I

> "Riley Ritchie Gardner . . . did unlawfully, feloniously and recklessly cause the death of another human being, to wit: Derial W. McCaw, by stabbing with a flat-bladed knife the lung area of the person of said Derial W. McCaw, said conduct of the said defendant manifesting extreme indifference to the value of human life."

STATE OF OREGON

COURT OF APPEALS

STATE OF OREGON,	)	
	)	
Respondent,	)	MANDATE
	)	
v.	)	Appeal from WASHINGTON
	)	County
RILEY RITCHIE GARDNER,	)	
	)	No. 14 920
Appellant.	)	

This cause having come on to be heard on appeal and having been duly submitted and considered:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant damages, costs and disbursments in this court in the amount of $--.

The cause is remanded for further proceedings pursuant to law and this Court's decision and opinion herein.

ENTERED at Salem, Oregon, this 19th day of February, 1974.

March 27, 1974

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Re: State v. Riley Ritchie Gardner

Gentlemen:

The Court of Appeals has today declined to reconsider it's decision in the above entitled matter.

Very truly yours,

J. David Gernant
Legal Counsel

JDG:cj
cc: Mr. W. Michael Gillette
Solicitor General

Supreme Court